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No. 88-1847

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal
of Florida, First District

JOINT APPENDIX

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APPEAL DOCKETED MAY 12, 1989
PROBABLE JURISDICTION NOTED JUNE 11, 1990

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* * * *

The following items have been omitted from this
Joint Appendix because they appear on the indi-
cated pages of the Appendix to the Jurisdictional
Statement:

Opinion of the District Court of Appeal of Florida, First District	App. 1
Final Order of the Florida Department of Revenue	App. 6

RELEVANT DOCKET ENTRIES

- April 18, 1985 —Petition for Administrative Hearing, with Exhibits, filed with the Department of Revenue, State of Florida
- May 8, 1985 —Answer of the Department of Revenue received by hearing officer
- September 2, 1986 —Pre-Hearing Stipulation with Exhibits 1-8 received by hearing officer
- December 15, 1986 —Supplemental Response to Petitioner's Interrogatories filed with hearing officer
- March 24, 1987 —Recommended order of division of administrative hearings
- November 19, 1987 —Final order of Department of Revenue rendered
- December 8, 1987 —Notice of Appeal to District Court of Appeal of Florida, First District filed
- September 13, 1988 —Opinion of District Court of Appeal of Florida, First District filed, affirming final order of Department of Revenue
- September 27, 1988 —Motion for Rehearing filed with District Court of Appeal of Florida, First District
- October 12, 1988 —Motion for Rehearing denied by District Court of Appeal of Florida, First District
- October 27, 1988 —Notice invoking discretionary jurisdiction of the Supreme Court of Florida filed with District Court of Appeal of Florida, First District
- February 22, 1989 —Order of Supreme Court of Florida denying petition for discretionary review
- April 5, 1989 —Notice of Appeal to U.S. Supreme Court filed with District Court of Appeal of Florida, First District

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

PRE-HEARING STIPULATION

Petitioner Ford Motor Credit Company ("FMCC") and Respondent Department of Revenue ("Department"), through their respective counsel, hereby enter into the following pre-hearing stipulation.

I. NATURE OF THE ACTION

FMCC has invoked the Florida Administrative Procedure Act to challenge action by the Department to adjust FMCC's intangible tax return filed for tax years 1980 through 1982, inclusive. The Department seeks to collect additional tax plus interest and penalties. The Department contends FMCC owes a total amount of \$1,226,045 (as tax) plus \$486,369 (interest as of 7/20/84) and \$543,968 (as a non-fraud penalty) for the three years. A copy of the Department's Revised Notice of intent to Make Audit Changes and Explanation of Items is attached as Exhibit 1. FMCC contends no tax is due because: 1) Florida Statute § 199.112 is unconstitutional; 2) there is an insufficient nexus to permit the imposition of the tax, and 3) even if the tax can be imposed, interest and penalties should not be imposed.

II. BASIS OF JURISDICTION

FMCC filed a timely petition for a formal proceeding pursuant to Florida Statute § 72.011, Florida Statute, Ch. 120, and Florida Administrative Code, Ch. 12-6.

III. PLEADINGS RAISING ISSUES

On April 18, 1985, the Department of Revenue, Office of Agency Clerk received FMCC's petition for formal proceeding. On May 8, 1985, Respondent Department served its Answer, which relies in part on its Notice of Decision, dated October 8, 1984. The Notice of Decision is attached as Exhibit 2.

IV. PENDING MATTERS

Ford seeks answers to certain interrogatories which are the subject of a motion. The Department opposes that discovery. There is also an issue relating to the jurisdiction of an administrative hearing officer to consider this matter in light of the decision in *Florida Export Tobacco Co. v. Department of Revenue*, No. AY-145, Slip. Op. (Fla. 1st DCA, Sept. 30, 1985), *pet. for reh. en banc pending*.

V. CONCISE STATEMENT OF STIPULATED FACTS

The parties agree and stipulate to the following facts.

1. FMCC is a corporation organized and existing under Delaware law. FMCC maintains its principal place of business in Dearborn, Michigan. FMCC is a wholly owned subsidiary of Ford Motor Company.

2. FMCC qualified and is authorized to do business in the State of Florida pursuant to the foreign corporation provisions of Chapter 607, *Fla. Stat.*, and has continuously maintained a registered office and agent in this state during the audit years at issue.

3. During the tax years 1980-1982, inclusive, FMCC and Ford filed corporate tax returns in Florida and paid the taxes due thereon under the Florida Income Tax Code; FMCC maintained 7 to 8 branch offices and employed approximately 200 people in Florida; and Ford had contractual relationships with approximately 130 to 150 authorized Ford dealers in Florida. A copy of a representative agreement between Ford and the dealers is Exhibit 3 to this Stipulation.

4. FMCC's principal business is financing the whole-sale and retail sales of vehicles manufactured by Ford Motor Company. During the audit period FMCC provided financing for the purchase of vehicles as authorized by Ford dealers from Ford Motor Company. FMCC also: provided financing for the purchase of automobiles by the public from the dealers; and engaged in commercial, industrial and real estate financing, consumer loan financing, and leasing company financing in the State of Florida as well as other states. Attached as Composite Exhibit 4 are sample documents utilized by FMCC in the above financing.

5. The majority of the intangibles in question are accounts receivables held by FMCC and owned [sic] by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the State of Florida.

6. FMCC is the holder of security agreements executed by thousands of Florida debtors. These security agreements gave FMCC a lien on tangible personal property located in the State of Florida. The Florida Secretary of State's Office was utilized by FMCC during the assessment period to perfect and protect its liens created under these security agreements with Florida debtors by the filing of U.C.C. financing statements. None of the original notes are stored in Florida.

7. During the assessment period, FMCC utilized or could have utilized the Florida Courts to recover sums

due by Florida debtors on delinquent accounts receivable. In addition, FMCC utilizes the Florida Department of Highway Safety and Motor Vehicles to perfect its liens on motor vehicles pursuant to Ch. 319, Fla. Stat.

8. In 1983, the Department conducted an audit of the FMCC intangible tax returns for tax years 1980 through 1982, inclusive. On June 3, 1983, the Department proposed an assessment of tax, penalty and interest in the total amount of \$2,560,379.00. See Exhibit 5. FMCC filed a timely protest.

9. On October 8, 1984, the Department issued a Notice of Decision. See Exhibit 2. On December 12, 1984, the Department acknowledged receipt of FMCC's timely November 8, 1984 Petition for Reconsideration. On February 18, 1985, the Department issued a Notice of Reconsideration. See Exhibit 6.

10. FMCC elected to file a Petition for Formal Proceedings, which was received on April 8, 1985.

11. On the basis of the revised audit report, the Department of Revenue imposed the intangible tax on FMCC for the tax years 1980 through 1982, inclusive, in the following categories, and in the taxable amounts listed as follows:

[Table omitted in printing. It is reproduced in the Appendix to the Jurisdictional Statement at page App. 10.]

12. At the time it filed its petition for a formal hearing FMCC agreed to and paid the 1 mill tax, but no interest or penalty, on the following amounts. The taxability of these items is no longer in dispute, only penalty and interest.

	1980	1981	1982
(8) Ford Rent-A-Car Receivables	27,825,283	26,179,377	20,832,896
(12) CIR Receivables	23,243,257	27,387,938	24,222,621

13. Capital Loan Receivables (item 5 of paragraph 11) reflect amounts of money owed by Ford dealers to FMCC. The obligation arises from loans made to Ford dealers located in Florida to expand showroom or other facilities and for working capital.

14. The items listed as (10) Accounts Receivable—Customers and Others and (11) Accounts Receivables—Affiliates in paragraph 11 reflect only the amount of accrued interest to which FMCC is entitled on notes from non-affiliates and affiliates, respectively, from the last settlement date prior to year end until the end of each respective year. The principal amounts owed on these notes, which are not secured by realty, are included in other categories. The Department does not assess a tax for similar interest when the amount owed is secured by realty.

15. Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7.

16. The Department of Revenue has imposed penalties in the amount of \$543,968 composed of \$330,051 as the 25% delinquent penalty imposed pursuant to Fla. Stat. § 199.052(9)(a) (1983), and \$15,886 as the 15% undervalued Property penalty imposed pursuant to § 199.052(9)(d) (1983), F.S. The Department offered abatement of the 15% omission penalty (\$198,031) imposed pursuant to Fla. Stat. § 199.052(9)(c) (1983). The closing agreement required pursuant to Fla. Stat. § 213.21 reflecting this reduction of penalty was not signed by petitioner.

17. FMCC's intangible tax returns have been audited on prior occasions. The manner of reporting was identical to the manner in which FMCC reported its intangibles for tax years 1980 through 1982. The 1973-1975 and the 1976-1978 audits were "no change" audits. FMCC's method of reporting receivables generated from Florida sales was challenged by the Department of Revenue.

nue. The challenge was dropped because the Department of Revenue did not have the statutory authority to assess sales of tangible personal property with an f.o.b. point other than Florida. Chapter 77-43, Laws of Florida amended § 199.112, Fla. Stat. to allow tangible personal property regardless of the f.o.b. point of sale. This amendment applied to the January 1, 1978 taxable year. There was a 1978-1980 "no change" audit.

18. Ford Motor Company has filed refund claims for certain categories for the tax year 1981 and 1982. Ford Motor Company claims that it inadvertently paid intangible tax on accounts receivable owned by FMCC. As presented in the Notice of Decision, no refund will be made as it will be handled as a credit against taxes due by Ford Motor Company.

19. While not an announced policy, the Department of Revenue drafted and utilized proposed rules relating to compromising penalties. These rules are not final. Attached as Exhibit 8 are the proposed rules. A copy of these rules was provided to Petitioner by letter dated July 28, 1986. In addition, while not an announced policy the Department of Revenue utilized guidelines established by the Internal Revenue Service and federal court for compromising penalties.

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EXHIBIT 7 TO PRE-HEARING STIPULATION

FMCC operated in a competitive marketplace at both a retail and wholesale level. Most, though not all, authorized Ford dealers used the FMCC wholesale dealer plan. FMCC also handled retail and, on a very infrequent basis, wholesale financing for used cars regardless of the manufacturer so long as the used car was in the inventory of a dealer with whom FMCC had a relationship.

At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers. While some dealers did not use the FMCC plan, most did. There was no requirement that the dealer use the FMCC plan.

To use the FMCC plan, the dealer would complete an Application for Wholesale Financing and Security Agreement, which included a designation of FMCC in Dearborn as the attorney-in-fact for the dealer. This designation authorized the execution of promissory notes and security instruments necessary for the wholesale financing plan. The FMCC branch assembled information from the dealer and undertook a financial investigation of the dealer. The amount of the line of credit sought by the dealer was the principal factor in determining whether the FMCC branch or headquarters components in Dearborn authorized the arrangement. During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May 1982, based on greater authority having been given to all branches, the number of branch approvals increased to approximately 35%.

If approval was given, the FMCC branch notified the Ford Motor Co. district sales office ("DSO") in Jacksonville, Florida. If approval was given by a FMCC headquarters component in Dearborn, the FMCC branch was notified by Dearborn of that fact and the branch notified the DSO.

The dealer ordered cars through the DSO, which in turn placed the order with the appropriate assembly plant none of which were located in Florida. The certificate of origin usually accompanied the car to the dealer but, except for infrequent occasions, did not go through the branch in any event. At the time of delivery to the carrier, the dealer's attorney-in-fact, an FMCC/Dearborn employee, authorized the draw against the dealer's line of credit with FMCC. FMCC credited Ford Motor Co.'s account for the amount of the vehicle.

The dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida financial institution. The FMCC branch received instructions from FMCC headquarters in Dearborn on the amount of money to be retained in this account. The FMCC branch called Mellon Bank, which was not in Florida, daily and Mellon arranged for the transfer of the balance. The wire transfer was always made to the same "pooling bank" in Pittsburgh, Pennsylvania. While the branch deposited money to the Florida bank, the branch drew its funds only from a Detroit, Michigan bank. None of the "wholesale" deposits could be used by the branch for use in financing retail transactions, or any other purpose.

When the dealer sold the car, either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch. Notice then was given to Dearborn to cancel the "wholesale" indebtedness. The dealer satisfied the principal balance due on the car. Within ten working days after month end, the FMCC branch billed the dealer for the monthly accrued interest. The dealer satisfied this amount by the billed month end (e.g.—a car is sold May 10, the dealer pays FMCC the principal amount on May 10, the interest is computed for the period May 1-May 10, FMCC bills the dealer before the end of the first week of June, and the dealer pays the May 1-May 10 interest

by June 20). The FMCC branch would include other funds as a part of the regular "wholesale" deposits to the Florida bank.

The FMCC branch could engage in direct floor plan financing when a "dealer trade" occurred. This transaction is explained as follows: Dealer Red had a red car. Dealer White had a white car. White sells the white car to Red and receives a check from Red payable to White. White also wants a car to sell so he gets the red car, too. White goes to FMCC branch, gets a check for Red, finances the red car and pays off Red. Red now has and sells the white car. White now has: paid off FMCC for the white car; "bought" the red car; and financed the red car with the FMCC branch (not Dearborn). The dealer also could simply transfer the car to another dealer subject to approval by the FMCC branch. Under the terms of the transfer, FMCC's security interest would simply be transferred with the car to the new dealer.

Aside from handling dealer money and dealer trades, the FMCC branch also performed audits of dealers to insure cars were not sold out of trust (i.e., without notice of the sale and satisfaction of the indebtedness owed to FMCC).

The Florida FMCC branches also were involved in wholesale and retail financing of tractors and farm equipment. At the retail level, the process was identical to the process used for cars, although a UCC statement was filed in the State of Florida for items to be kept in Florida. At the wholesale level, the dealer provided the FMCC branch with a promissory note covering the entire line of credit. Documentary stamps were affixed locally (i.e. in Florida) to the notes and the notes were retained locally. The dealer, however, ordered the tractor through the same mechanism used for cars and FMCC paid Ford Motor Co. in Michigan. If the dealer

exceeded the amount on the note, a new additional note with stamps affixed was obtained.

At the retail level, FMCC actively competed with local banks to provide financing. The dealer could submit a proposed retail contract to FMCC and other institutions for financing to maximize the likelihood that the customer would obtain financing approval and thereby complete a sale. The retail application was submitted to the FMCC branch, which conducted a financial check on the consumer. If the deal were accepted, the dealer satisfied its wholesale obligation on the vehicle. Simultaneously or shortly thereafter, the dealer formally assigned the financing contract to FMCC. The dealer then could either: 1) present the contract to the FMCC branch and get a check directly, which was rare; or 2) prepare and submit a sight draft to a Florida bank for payment. If the FMCC branch paid the bank with the FMCC Michigan check the same day the draft was presented, the bank paid the dealer on the sight draft through normal banking channels. FMCC and the dealer exchanged checks—they did not simply use accounting book entries to eliminate the wholesale receivable.

The dealer received the principal amount (purchase price less the down payment) from the FMCC branch on the retail financing contract. The dealer could "sell" the note to FMCC under a repurchase or without recourse provision. Under the repurchase provision, if the purchaser defaulted, FMCC repossessed the car and presented it to the dealer for repurchase. If the note were without recourse, FMCC handled the problem directly[.] FMCC repossessed the car, and sold it at the automobile wholesale auction.

If the retail financing contract was approved, the Florida branch sent the *original* financing contract to Dearborn which maintained the original contract in Michigan. The FMCC branch prepared a report, and

sent the amount owed for Florida documentary stamps to the state on a monthly basis. The FMCC branch retained the car title, a copy of the financing contract, and background financial information on the consumer. Absent some direct communication by the purchaser or a problem with delinquency, the branch would not hear from or see the consumer.

The consumer received a payment coupon book. Payment was made to a FMCC in care of a Florida financial institution which handled the money in accordance with FMCC/Dearborn instruction. A consumer could also make walk-in payments directly at a FMCC branch. However, the branch had no control over these funds. Reports of payments were sent to Dearborn by the payment center. Dearborn then provided the branch with updated computer information on the account by account number and amount. When a zero dollar balance was achieved, the loan was satisfied, and the branch sent the Department of Motor Vehicles a notice that the lien was satisfied. The car title would be sent to the consumer. If the consumer sold or traded the car prior to paying off the loan, the branch received the final payment and released the title. If the branch received either a final or interim payment by the consumer, those funds were deposited into the same Florida bank account as the "wholesale" payment received from the dealer. Accordingly, the branch could not utilize those funds either.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

INTERROGATORIES TO RESPONDENT

Petitioner Ford Motor Credit Company requests the Department of Revenue to provide written responses under oath to the following interrogatories.

1. Is it the policy of the Department of Revenue to collect, assess, or impose the Florida Intangible Tax on intangibles arising in the following situations:

a) a sale of tangible personal property is made in Florida, the intangible (note) is executed in Florida and maintained and serviced in Florida, and the tangible property is shipped from Florida (F.O.B. Florida) to another state pursuant to the terms of the contract for sale;

b) a sale of tangible property is made in Florida, the property is delivered to the customer/purchaser in Florida, the intangible (note) is executed and retained and serviced in Florida but the customer/purchaser subsequently permanently removes the tangible property from and uses the tangible property outside of Florida;

c) a sale of tangible property is made in Florida, the intangible (note) is created in Florida, the tangible prop-

erty is delivered to a customer/purchaser in Florida but the owner of the intangible subsequently sends the note out of Florida and servicing of the intangible is made outside of Florida;

d) a sale of tangible property is made outside of Florida, the tangible property is delivered outside of Florida, the intangible (note) is executed outside of Florida, servicing of the note is performed outside of Florida, but the customer/purchaser of the tangible property takes to and maintains the tangible property in Florida subsequent to the sale;

e) a sale of tangible property is made outside of Florida, the tangible property is delivered outside of Florida, the intangible (note) is executed outside of Florida, the intangible is serviced outside of Florida, but subsequent to the sale and execution of the note, the customer/purchaser of the tangible property moves the property to Florida and the owner of the intangible transfers the intangible and servicing responsibility for the intangible to its Florida office.

[Respondent's Initial Response to Interrogatory 1]

1.(a) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response;

What constitutes a "sale"; who is the owner of the intangible; what does "maintained and serviced in Florida" mean?

1.(b) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "retained and serviced in Florida" mean?

1.(c) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "servicing of the intangible" outside of Florida mean?

1.(d) Objection on the ground that Petitioner has not furnished sufficient information to determine whether the intangible is taxable under Chapter 199, Fla. Stat. Additional information regarding the following is necessary in order to properly frame a response:

What constitutes a "sale"; who is the owner of the intangible; and what does "servicing of the note is performed outside of Florida" mean?

1.(e) See response to 1.(d) above; in addition, what is meant by "servicing responsibility."

2. Has the Department of Revenue implemented the policy by imposing, collecting, or assessing the intangible tax in each of the five situations delineated in interrogatory no. 1.

[Respondent's Initial Response to Interrogatory 2]

Respondent is unable to frame a response to this Interrogatory due to the lack of pertinent information.

3. Does the presence or absence of a place of business in Florida by the owner of the intangible affect the Department of Revenue's determination to impose, collect, or assess the intangible tax in each of the five situations delineated in interrogatory no. 1.

[Respondent's Initial Response to Interrogatory 3]

Respondent is unable to frame a response to this Interrogatory due to the lack of pertinent information.

4. If the answer to interrogatory no. 3 is in the affirmative, state how the Department of Revenue's determination is affected.

[Respondent's Initial Response to Interrogatory 4]

Respondent is unable to furnish a response to this Interrogatory due to the lack of pertinent information.

/s/ J. V. Parramore, Jr.

Subscribed and sworn to before me this 26th day of September, 1986.

/s/ Janice S. Jacobs
Notary Public,
State of Florida

My Commission Expires
Aug. 7, 1990

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

Case No. 85-1303

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondent.

SUPPLEMENTAL RESPONSE TO
PETITIONER'S INTERROGATORIES

Respondent, Florida Department of Revenue, submits the following in response to Interrogatories to Respondent served August 30, 1986. A previous Response to these Interrogatories was served on October 1, 1986, in which Respondent objected to most of the Interrogatories on the ground that Petitioner had not furnished sufficient information to enable Respondent to frame a Response. By letter dated October 17, 1986, Petitioner provided Respondent with definitions of the terms and phrases used in the Interrogatories and the following Supplemental Response incorporates and utilizes the definitions supplied in said letter.

With reference to Interrogatories 1a through 1e, Respondent initially wishes to point out that the Florida Department of Revenue is the state agency charged with the administration, collection and enforcement of the Intangible Personal Property Taxes imposed by the Legislature in Chapter 199, *Fla. Stat.* The Legislature, not the Florida Department of Revenue, imposes this tax.

RESPONSES

1. a) Chapter 199, *Fla. Stat.*, imposes an annual tax of 1 mill on all persons who are legal residents of this state who own or manage intangible property. Therefore, intangible property arising out of a sale of property in this state which is "maintained and serviced in Florida" is subject to taxation under Chapter 199, F.S.

b) Same as 1a above.

c) Intangible property arising out of a Florida sale is subject to taxation under Chapter 199, *Fla. Stat.*

d) The intangible property arising out of the sale wholly outside of Florida has no tax situs in Florida, provided the owner is not domiciled in Florida.

e) Chapter 199, *Fla. Stat.*, imposes an annual tax of 1 mill on all persons who are legal residents of this state who own or manage intangible property. The transfer of intangible property to the owner's Florida office for "servicing responsibility" would subject the intangible property to taxation under Chapter 199, *Fla. Stat.*

2. Yes.

3. Yes.

4. It is one of the factors considered in determining if the owner of the intangible is doing business in Florida.

/s/ J. V. Parramore, Jr.
J. V. PARRAMORE, JR.
Department of Revenue

Sworn to and subscribed before me this 2nd day of December, 1986.

/s/ Janice S. Jacobs
Notary Public, State of Florida
My Commission Expires
Aug. 7, 1990